

Initially, the claimant argues because respondent does not contest the compensability of the claim, the Board does not have jurisdiction to review a preliminary hearing order for medical treatment.

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment are due to the admitted work-related accident or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The respondent initially did not deny compensability of the claim and provided claimant with treatment for an accidental injury of August 1, 2000. The medical records indicate such treatment was with Mark S. Dobyms, M.D., and later Frederick R. Smith, D.O. An MRI revealed a central herniated disc at L5-S1. Claimant was referred to Paul S. Stein, M.D., on January 29, 2001. Dr. Stein opined claimant's problem was related to L5-S1 disc disease with central protrusion and some radicular irritation. Dr. Stein recommended an epidural steroid injection at L5-S1. The doctor further noted if claimant did not respond to a series of two or three epidural injections then surgical intervention consisting of decompression and fusion at L5-S1 should be considered.

Claimant was provided treatment until August 20, 2001, when Dr. Smith concluded claimant was at maximum medical improvement and released him from treatment. Although claimant had been released from treatment and rated by Dr. Smith, he requested additional treatment.

Respondent authorized a one time visit with Dr. Stein on January 29, 2002. The claimant was complaining of low back pain which had progressed from his injury of August 1, 2000. Dr. Stein recommended a CT scan and concluded that if such testing revealed disruption at L5-S1 he would again recommend surgery.

Respondent argues the surveillance tapes taken in May and July 2001 which depict claimant bowling and walking long distances corroborate claimant was at maximum medical improvement at that time. Claimant subsequently relocated to Kansas City and

¹K.S.A. 44-551(b)(2)(A).

²K.S.A. 44-534a(a)(2).

then Omaha, Nebraska where he obtained employment working at a Kwik Shop. Because claimant was released from treatment in August 2001, respondent argues any worsening after that time is unrelated to his work-related accident.

Claimant's attorney countered that claimant's work activities at Kwik Shop are non-physical and there has been no subsequent injury at that job. In addition, claimant is able to alternate sitting and standing in his job as a cashier at Kwik Shop. Moreover, claimant has made numerous requests for respondent to authorize any doctor in Omaha.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.³ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁴ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

In general, however, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent activity aggravated, accelerated or intensified the underlying disease or affliction.⁵

The Board is persuaded by the medical records of Dr. Stein that claimant had suffered a herniated disc at L5-S1. Before claimant was released from treatment Dr. Stein had recommended surgery if claimant did not respond to the recommended epidural steroid injections. When Dr. Stein again saw claimant after Dr. Brown's release, Dr. Stein made the same treatment recommendation. Although Dr. Brown had released claimant, the findings of Dr. Stein corroborate claimant's position that he had not attained maximum medical improvement and needed additional medical treatment.

The claimant's low back pain somewhat responded to conservative treatment but as claimant became more active the pain returned. There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's increased activity, though perhaps a factor in claimant's increased

³Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

⁴Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

⁵See, Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

symptoms, was not an intervening injury. His condition, therefore, is compensable as a direct and natural consequence of the August 1, 2000, injury. Accordingly, respondent should remain liable for claimant's ongoing medical treatment. The Administrative Law Judge's Order should, therefore, be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated March 26, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2002.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
 William L. Townsley III, Attorney for Respondent
 John D. Clark, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director